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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

THE SCO GROUP, INC.,

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Defendant/Counterclaim-Plaintiff.

**DEFENDANT/COUNTERCLAIM-PLAINTIFF
IBM'S MOTION TO STRIKE MATERIALS
SUBMITTED BY SCO IN OPPOSITION TO
IBM'S CROSS-MOTION FOR PARTIAL
SUMMARY JUDGMENT**

(ORAL ARGUMENT REQUESTED)

Civil No. 2:03CV-0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

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Defendant/Counterclaim-Plaintiff International Business Machines Corporation (“IBM”) respectfully submits this motion to strike materials submitted by Plaintiff/Counterclaim-Defendant The SCO Group, Inc. (“SCO”) in opposition to IBM’s cross-motion for partial summary judgment on its Tenth Counterclaim.

In an attempt to create a fact dispute in opposition to IBM’s cross-motion for partial summary judgment on its Tenth Counterclaim, SCO has submitted, and seeks to rely on, incompetent and inadmissible evidence. Under Rule 56(e) of the Federal Rules of Civil Procedure and the Federal Rules of Evidence, the Court should exclude these materials from the record on IBM’s motion.

Specifically, SCO offers the declarations of three witnesses, Sandeep Gupta, Chris Sontag and John Harrop, consisting almost entirely of testimony not made on personal knowledge and improper opinion testimony. Indeed, SCO does not even attempt to show that these witnesses may properly offer opinion testimony, either because the testimony is “rationally based on the perception” of the witnesses, Fed. R. Evid. 701, or that the witnesses are “qualified as . . . experts by knowledge, skill, experience, training, or education” and have applied “reliable principles and methods” in reaching their conclusions, Fed. R. Evid. 702. Furthermore, Mr. Harrop’s declaration is replete with pure legal argument (which notably is primarily addressed to SCO’s motion to dismiss, and not IBM’s motion for summary judgment). Accordingly, the offending portions of the Gupta, Sontag and Harrop declarations should be stricken.

In addition, SCO seeks improperly to rely on certain news articles for the truth of their contents. That is classic inadmissible hearsay and should also be stricken. See Fed. R. Evid. 802.

For the foregoing reasons, IBM respectfully submits that the Court strike the Gupta and Sontag Declarations in their entirety, as well as paragraphs 4-9, 11-24, 27, 29-30, 32-34, 36-41, 43, 44, 47, 50-52, 54, 56, 58-65, 67, 69-72, 76-95 of the Harrop Declaration, and not consider

them in ruling on IBM's Cross-Motion for Partial Summary Judgment on its Tenth Counterclaim. In addition, IBM respectfully submits that the Court should strike Exhibits 24, 25A, 33, 36, 38, 41, 42, 44, 50-52, 56-59, 61, 63-65 and S-3. Finally, IBM respectfully submits that all portions of SCO's opposition brief relying on the improper testimony of Mr. Gupta, Mr. Sontag and Mr. Harrop or inadmissible documents also be stricken from the record, including in particular ¶¶ 1 n.3, 3, 8, 10, 10 n.5, 11, 12-14, 40, 44 and 47 of SCO's statement of facts.

IBM further respectfully requests that the Court hold oral argument on this motion. This motion is further supported by the memorandum of points and authorities and by such argument as shall be presented at hearing.

DATED this 26th day of August, 2004.

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CERTIFICATE OF SERVICE


I hereby certify that on the 23rd day of August, 2004, a true and correct copy of the foregoing was hand delivered to the following:

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